14509

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
ALPHONSINE McGREW,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

The defendant in error herein duly moved this court to dismiss this Writ of Error, and this court continued the hearing of said motion until the hearing of this appeal on its merits. We will, therefore, for the convenience of the court, repeat herein our printed argument on said motion, with such enlargement as a more thorough investigation has permitted.

Statement of the Case.

This was an action brought by the defendant in error against the plaintiff in error in the superior court of the City and County of San Francisco, State of California, upon a policy of insurance issued by the plaintiff in error upon the life of Henry McGrew, the hus-

band of the defendant in error, and made payable upon his death to the defendant in error. This policy was issued in Honolulu, Hawaiian Islands, on the 14th day of September, 1892, while said defendant in error and said Henry McGrew were husband and wife, and were there residing. It was payable in New York.

The plaintiff in error pleaded in defense to said action:

(1) That prior to the death of said Henry McGrew the latter became of unsound mind, and a guardian of his person and estate was appointed in proceedings instituted in Honolulu;

(2) That *this guardian* began in Honolulu proceedings for a divorce of said Henry McGrew from defendant in error on the ground of her adultery, and upon the 23rd day of August, 1894, a judgment was entered in said divorce proceedings granting said divorce for said cause;

(3) That by virtue of the laws of the Hawaiian Islands, then in force, when a decree of divorce is granted on the ground of the adultery of the wife, the husband shall hold her personal estate forever, and under said law and said decree of divorce said policy of insurance became the absolute property of said Henry McGrew;

(4) That subsequent to the death of said Henry McGrew the administrator of his estate commenced in Honolulu an action on said policy against said plaintiff in error, and recovered judgment for the amount of said policy;

(5) That plaintiff in error had paid to the said administrator of the estate of Henry McGrew the amount of said judgment.

The trial court held that no testimony as to said action on said policy or as to the payment of the judgment given therein was admissible, as defendant in error was not a party to said action and, consequently, was not bound thereby.

The defendant in error recovered judgment in said superior court for the amount of said policy, and plaintiff in error appealed therefrom to the supreme court of the State of California.

In the said supreme court the plaintiff in error for the first time set up, but only in its *brief and petition for rehearing*, Art. VIII of the Treaty of November 9th, 1850, between the United States of America and the Kingdom of Hawaii, and claimed rights thereunder.

The supreme court affirmed the judgment of said superior court in favor of the defendant in error, but in its opinion made no reference to this treaty or to any rights arising thereunder.

From this judgment of the supreme court the plaintiff in error has taken out a writ of error to this court upon the alleged ground that a federal question is involved in this case, to-wit: That said plaintiff in error had claimed in said superior court and in said supreme court that, by a treaty concluded between the United States and the Kingdom of Hawaii, it was provided "That if a question should arise among several claim-"aints as to which of them said goods belonged, the "same shall be decided finally by the laws and judges

" of the land wherein said goods are", that under said Hawaiian Statute and said decree of divorce and said judgment rendered by said Hawaiian Court the title to said policy had been decided to be in the said Henry McGrew, that this title was protected by said Treaty, and that therefore plaintiff in error was deprived by said California judgment of a right under said Treaty.

Motion to Dismiss.

The defendant of error moves this court to dismiss this writ in error on three grounds:

I.

There is no federal question in this case.

II.

No federal question was specially set up or claimed in either the California trial or appellate court, as required by the third clause of Section 709 of the Revised Statutes.

III.

No federal question was necessarily or at all involved in the decision of the California court, nor is any apparent in the record.

I.

There is no federal question in this case, because plaintiff in error did not claim *in or for itself* any right under the treaty.

Plaintiff in error here does not claim *in or for itself* any right under the treaty with Hawaii, or any right which is protected by that treaty, but only that a *third*

person has a right under that treaty, or which is protected thereby, and that, by virtue of such alleged right, such *third person*, and not the defendant in error, is the owner of, and entitled to the subject matter of this action, to-wit, said policy of insurance and the money due thereon; and therefore, that said *third person*, and not the defendant in error, is entitled to have and recover the amount of said policy from plaintiff in error. Hence, plaintiff in error is not asserting a right *in itself* under the treaty, but in a *third person*; which, if established, might be a defense in the State court, but presents no federal question.

In *Owings* vs. *Norwood*, 5 Cranch. 344, which was an action of ejectment, the defendant set up title in a third party, and claimed that said title in said third party was protected by the treaty between the United States and Great Britain, and took out a writ of error to this court from the judgment against him, claiming that he had been denied a right under a treaty. This court held that in order to vest jurisdiction in this court under Section 709, a party must *for himself* claim a right, title, privilege or immunity under the Constitution or an Act of Congress or a treaty, and that it is not sufficient to assert title, etc., thereunder in a *third person* merely, under whom the party does not claim any interest, and which third party is not a party to the action. The court held that the defendant in ejectment was entitled to set up title in a third party, but that this was by virtue of *the State law* and not by virtue of any treaty.

This rule was affirmed in

Verden vs. *Coleman*, 1 Black 472;

Henderson vs. *Tennyson*, 10 How. 323;
Hale vs. *Gaines*, 22 How. 160;
Giles vs. *Little*, 134 U. S. 650;
Tyler vs. *Judges*, 179 U. S. 407.

In *Giles* vs. *Little* this court said:

> "It is well settted that in order to give this court jurisdiction to review a judgment of the State court against a title or right set up or claimed under a statute or an authority exercised under the United States, that title or right must be one of the plaintiff in error, not of a third person only."

In the case at bar the plaintiff in error, the insurance company, cannot claim for itself any right or title under the treaty any more than could the defendants in any of the above cases.

In *Verden* vs. *Coleman*, *supra*, which was an action to foreclose a mortgage, the mortgagee pleaded as a defense that the mortgage had been executed to secure the purchase money of the land, and that at the time of the purchase of the land and the execution of the mortgage the title was not in the vendor and mortgagee, but in a third party by virtue of a treaty, and that therefore he had a complete defense by virtue of a treaty. The court held that the defendant did not himself claim under the treaty, but was setting up the title in a third person, which he alleged was protected by the treaty, but that neither this third person nor his heirs had any interest in the suit, nor could their rights be affected by the decision in the case, and therefore the court had no jurisdiction by reason of any treaty.

In the case at bar the plaintiff in error was sued in Honolulu upon this policy by the administrator of the estate of the husband of defendant in error, who might under certain circumstances have claimed under the treaty. It did not interplead the defendant in error nor did it pay the money into court and seek its discharge; but it defended the action, to which defendant in error was not a party, and perhaps lost and paid the judgment. There is, however, no evidence as to this judgment and payment, as the court ruled the evidence upon such matters incompetent and refused to admit the same. But, whether there was such judgment or not, the said judgment bound the insurance company alone, and in paying it, if it did pay it, it paid simply its own liability as adjudged in that proceeding. Its duty was and is simply contractual.

Under this contract defendant in error was the payee. It is alleged, but not proven, that in an action to which said defendant was not a party, the title to this policy was litigated between plaintiff in error and a *third* party, and decided in favor of said *third* party, but this was not binding upon defendant in error. The title to this policy, as between said third party and said defendant in error, was not determined by this judgment, and plaintiff in error cannot set up this judgment against defendant in error for any purpose. If said third party has any title to this policy which is protected by this treaty, plaintiff in error cannot set it up so as to give this court jurisdiction, as it has no right in itself to this policy which is protected by the treaty or otherwise.

In *Owings* vs. *Norwood*, *supra*, this court said:

> "The plaintiff in error does not contend that his right grows out of the treaty. Whether it is an obstacle to the recovery of defendant in error is exclusively a question for the decision of the courts of Maryland."

In the case at bar the plaintiff in error cannot successfully contend that its right grows out of the treaty. Whatever right the husband of defendant in error had by virtue of the decree of divorce and the statute, might have been an obstacle to the recovery by said defendant in error, but whether it was or was not a question exclusively for the decision of the courts of California.

In *Verden* vs. *Coleman*, *supra*, which, as we have said, was an action for the foreclosure of a mortgage, and in which the mortgagor pleaded that the mortgage was to secure the purchase money of the land, and that the title to the land was bad because pursuant to a treaty it had vested in a third person, an Indian, and that therefore plaintiff, the mortgagor, should not recover, the court said:

> "Nor can we claim jurisdiction of the case because of the title set up under the treaty with the Indians, because neither the Indian claimant, nor any one claiming under him is a party to the suit."

In the case at bar this court cannot claim jurisdiction because the title to this policy, which had vested in the husband of defendant in error, was protected under the treaty, as neither the husband nor his heirs, nor anyone claiming under him, is a party to this suit.

In *Harrison* vs. *Tennessee*, *supra*, which was an action of ejectment in which the defendant relied upon an outstanding title in a third person, which he claimed was protected by a treaty, this court said:

> "The right to make this defense is not derived from the treaties, nor from any authority exercised under the general government. It is given by the laws of the State, which provide that the defendant in ejectment may set up title in a stranger and bar the action. It is true that the title set up in this case was claimed under a treaty, but to give jurisdiction to this court, the party must claim the right *for himself*, not for a third person, in whose title he has no interest."

In the case at bar the law of California and not the treaty gave plaintiff in error the right to plead in defense that the defendant in error was not the owner of the policy, and that she was not entitled to recover thereon by reason of the alleged fact that title thereto had passed to her husband by virtue of the decree of divorce and the Hawaiian statute, and which right in the husband was protected by the treaty. But that was merely asserting a right under this treaty, or which was protected by the treaty, *in a third person*, and not at all a right in the plaintiff in error. It had and has no claim or title of any kind whatever that is protected by any treaty; nor has it acquired any from such third person. It did not take an assignment of the policy from the husband or his representative, nor was it subrogated to them by the payment of the policy to them. Subrogation takes place when one, for his own protection, pays a debt which some one else ought to pay (*Randall* vs. *Duff*, 107 Cal. 35). In this case the plaintiff in error did not pay any debt which some one

else ought to pay, but has simply paid its own debt to the wrong person, if it has paid it. The fact that in an action, to which defendant in error was not a party, a third person had acquired an adverse judgment against plaintiff in error, and that it had paid such judgment, if there ~~was~~ were such a judgment and payment, was entirely immaterial in this action, as neither of those things, nor both of them together, would or could or did assign the rights of such third person to plaintiff in error, or subrogate it to the rights of such third party under the treaty. There was no relationship of surety or trust or any other matter which would give ground for the enforcement of the doctrine of subrogation. On the contrary, the case would be analogous to that of a third party recovering in an action of replevin a judgment against plaintiff in error for a specific chattel; and subsequently the defendant in error suing plaintiff in error for damages and for taking and detaining the same chattel. Undoubtedly the latter action might be defended on the ground that there was no right or title in the defendant in error, and the right of the third person might be set up, but such defense would be made under the State law. The right to make it would not be conferred by this treaty, even though as against the defendant in error the third party might invoke such treaty *in a contest between them* as to the ownership of such chattel.

Hence, while as a matter of defense, in the state court, the plaintiff in error was entitled to show title, if it could, in the husband of defendant in error, yet such defense was made under the law of California. It could not give this court jurisdiction to entertain this

writ of error, by pleading the husband's right to this policy and its protection by this treaty. To accomplish this it must plead in itself some right to this policy secured by this treaty, and that it did not do. It could not plead any right to this policy by virtue of the judgment rendered in Honolulu in the action to which defendant in error was not a party, nor by virtue of the payment of said judgment, because said defendant was not bound by such judgment or the payment thereof.

It therefore follows that there is no federal question in this case because of said treaty, and no attempt is made to deduce such a question from any other source.

II.

This writ should be dismissed for want of jurisdiction in this court to entertain it, because no federal question was specially set up or claimed in the California courts.

1. THIS WRIT OF ERROR IS TAKEN UNDER THE THIRD CLAUSE OF SECTION 709 OF THE REVISED STATUTES.

The *first two* clauses include cases where is drawn in question the validity of a treaty or statute of, or authority exercised under the United States, and the decision is against its validity, or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity. The *third* clause includes only those cases where any title, right, privilege or immunity is claimed under the constitution, or any treaty or statute of, or commission or authority exercised under the United

States, and the decision is against the title, right, privilege or immunity *specially set up or claimed* by either party under such constitution, treaty, statute, commission, or authority.

It will be noticed that the words "*specially set up or claimed*" are used only in the *third* clause. Therefore, in *Tyler* vs. *Judges*, 179 U. S. 408, this court said:

> "It is true that under the third clause of Section 709, where a title, right, privilege or immunity is claimed under a federal law, such title etc. must be '*specially set up or claimed*', and that no such provision is made as to cases within the *second* clause, involving the constitutionality of State statutes or authorities."

In a still more recent case this court held that in cases arising under the *first* and *second* clauses of this section the federal question need not necessarily be *specially set up and claimed*, if it *appears in the record and was decided*, or if such question was *necessarily* involved in the case, and the case could not have been decided without deciding such question, *but that in cases arising under the third clause*

> "the federal right, title, privilege or immunity *must be, with possibly some rare exceptions, specially set up or claimed* to give this court jurisdiction".
>
> *Water Power Co.* vs. *Columbia*, 172 U. S. 488.

This distinction between cases arising under the *first* and *second* clause of Section 709, and those arising under the *third* clause of said section, must be kept in mind in considering the decisions upon this section, or much confusion will arise.

In *Yazoo* vs. *Adams*, 180 U. S. 14, this court again referred to this distinction, and said—

> "It is only in cases arising under the *third* clause of the section where a right, title, privilege or immunity is claimed, 'that the federal question must be *specially set up*'."

As this is the last enunciation of the rule of this court in cases arising under this section of the Revised Statutes, we must conclude that this writ must be dismissed unless the *record* shows that some right, title, privilege or immunity under the treaty in question was *specially set up or claimed*, or unless this case is shown to be a *rare exception* to this rule.

This, of course, does away with the contention of plaintiff in error that such a federal question can be raised by *inference or implication*, which contention is flatly refuted by the statement of this court in *Oxley Stave Co.* vs. *Butler*, 166 U. S. 655, that

> "The purpose of a party to assert a federal right cannot be left to mere *inference*", "that the jurisdiction of this court to re-examine the final judgment of a State court cannot arise from a mere *inference*."

See also *Green Bay* vs. *Patten Paper Co.*, 172 U. S. 67.

2. THIS COURT HAS HELD IN NUMEROUS CASES THAT A RIGHT, TITLE, PRIVILEGE OR IMMUNITY UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES, OR UNDER A TREATY, MUST BE ESPECIALLY SET UP OR CLAIMED AT THE PROPER TIME AND IN THE PROPER WAY.

The *proper time* and the *proper way* for *setting up* this right is in the *trial court*.

This right, title or privilege must not only be *specially set or claimed*, but it should be *specially set up* in the *trial court*.

In *Spies* vs. *Illinois*, 123 U. S. 181; *Baldwin* vs. *Kansas*, 129 U. S. 57, and *Miller* vs. *Texas*, 153 U. S. 538, this court held that the federal question must be specially set up in the *trial* court, and said:

> "As the supreme court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the supreme court was only authorized to review the judgment for errors committed there, and we can do no more * * * If the right was not set up or claimed in the proper court below, the judgment of the highest court of the State in the action is conclusive, so far as the right of review here is concerned."

In *Parmalee* vs. *Lawrence*, 11 Wall 39, this court said that the federal question

> "Must appear in the pleadings in the suit, or from evidence in the course of the trial, in the instructions asked for, or from exceptions taken to the rulings of the court."

(3) IT CANNOT BE FIRST SET UP IN THE ARGUMENT IN THE STATE SUPREME COURT.

It is fatal to the jurisdiction of this court if a party defers, until he files his briefs in the State supreme court, the setting up of such a right, title or privilege, *as the mere arguments of counsel form no part of the record.*

It is true that this court in *Oxley Stave Co.* vs. *Butler*, 166 U. S. 655, quoted with approval the following from its opinion in *Maxwell* vs. *Newbold*, 18 How. 516:

> "The questions raised and decided in the State circuit court point altogether for their solution to the laws of the State, and make no reference whatever to the Constitution or laws of the United

States. Undoubtedly this did not preclude the plaintiffs in error from raising the point in the supreme court of the State, *if it was involved in the case as presented to that court.*"

But this court had in mind, in making this statement, the raising of the point in the State supreme court by incorporating it in the record submitted to that court as one of the assignments of errors taken to the rulings of the trial court. This court did not mean that such a question can be presented to the State supreme court only in the *oral or printed arguments.*

In *Baldwin* vs. *Kansas*, 129 U. S. 57, this court said:

> "In the present case the record does not show at the trial before the jury any right, title, privilege or immunity under the Constitution of the United States was specially set up or claimed. No objection was taken to the form of the oath at the trial, nor at the making of the motion for a new trial before the trial court, nor at the making of the motion in arrest of judgment. *The point was first suggested in the supreme court of the State.* The court, as it appears, refused to consider the objects on the ground that it was not taken at the trial. *For that reason we also cannot consider it.*"

This court has held that it will not take jurisdiction of a writ of error under Section 709, if the federal question is first raised in the *argument in* the State supreme court. In *Zadig* vs. *Baldwin*, 166 U. S. 488, it said:

> "The contention that there was a federal question raised below finds its only support in the fact that there has been printed in the record, as filed in this court, what purports to be an extract from the closing *brief* of counsel presented to the supreme court of the State, in which such a federal question is discussed, and it is asserted orally at bar that in the oral *argument* made in the supreme

> court of California a claim under the Federal Constitution was presented. But, manifestly, the matters referred to form no part of the record and are not adequate to create a federal question when no such question was *necessarily* decided below, and the record does not show that such issues were set up or claimed *in any proper manner* in the courts of the State."

In *Sayward* vs. *Denny*, 158 U. S. 183, this court stated that in regard to writs of error under the third clause of Section 709 certain propositions were settled:

> "Among which was the proposition that the *arguments of counsel* form no part of the record upon which action is taken in this court," and also that "the right on which the party relies must have been called to the attention of the court in *some proper way*."

In *Parmalee* vs. *Lawrence*, 11 Wall 49, this court said that if the record does not show that a federal question was necessarily drawn in question,

> "This court cannot entertain jurisdiction to reverse the decision of the highest court of a State upon the ground that counsel brought it in question *in argument*."

This does away with the contention of plaintiff in error that it is necessary only that the federal question be called to the attention of the State court in any way whatever. In this regard plaintiff in error seems to claim that the test is simply whether the mind of the State court was directed to the right claimed. If this were the only test this court would never have held that the certificate of the presiding judge that a federal question was raised in the argument before the State supreme court cannot sustain its jurisdiction to entertain such a writ of error.

Parmalee vs. *Lawrence*, 11 Wall 49;
*Gulf etc. R. R. Co.*vs. *Hewes*, U. S. supreme court. Decided Nov. 18, 1901 (Advance Sheets, Dec. 16th, 1901).

A printed brief in the supreme court is no more than an argument, and shows no more than the certificate of the Chief Justice that the federal question was raised in the argument.

Appellant seeks to avoid the effect of these decisions by contending that the briefs filed in the supreme court of California are a part of the record because they are among the papers to which the clerk of said court has attached his certificate that "the preceding and annexed " is a true and correct copy of records". The same argument would make the " petition for writ of error" a part of such record which this court must consider, as it also is amongst the papers so certified, and yet it cannot be claimed that such a petition is a part of the record upon which action can be taken in this court (*Sayward* vs. *Denny*, 158 U. S. 183).

That the briefs in the State supreme court are not a part of such record is especially apparent from the opinion of this court in *Sayward* vs. *Denny*, *supra*, holding that the arguments of counsel form no part of such record, though the *opinions* of the State courts are now made so by rule.

Loeb vs. *Columbia*, 179 U. S. 485.

The same rule applies to the petition for rehearing, unless the State court considers and decides the federal question raised therein.

Capital Bank vs. *Cadiz*, 172 U. S. 431;
Mallet vs. *North Carolina*, 181 U. S. 592.

By analogy, we may refer to the decisions under Section 5 of the Judiciary Act of March 3, 1891, providing for writs of error from the district or circuit courts in any case involving the construction or application of any law of the United States.

In *W. U. Tel. Co.* vs. *Ann Harbor*, 178 U. S. 243, this court said:

> "It must *appear on the record, by a statement in clear and logical form, such as is required in good pleading*, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground."

In *Ansbro* vs. *U. S.*, 159 U. S. 697, this court said:

> "A case may be said to involve the construction or application of the constitution of the United States when a title, right, privilege or immunity is claimed under that instrument, but a *definite issue* in respect to the possession of the right *must be strictly deducible from the record*, before the judgment of the court below can be revised on the ground of error in the disposal of such claim by its decision."

In *Muse* vs. *Arlington*, 168 U. S. 435, this court said, after quoting the above:

> "The *same rule* is applicable in respect of the *validity or construction of a treaty*. Some right, title, privilege or immunity dependent on the treaty must be so *set up or claimed* as to require the circuit court to pass on the question of validity or construction in disposing of the right asserted. *The general doctrine has been frequently announced in cases involving the jurisdiction of this court under Section 709 of the Revised Statutes.*"

(4) Under the foregoing decisions this writ of error must be dismissed, unless plaintiff in error shows that this case is one of the rare exceptions to the rule laid down in *Water Power Co.* vs. *Columbia*, *supra*. It will not help plaintiff in error to argue that it is sufficient that a federal question appears in the record, and was decided against it, or that such decision was necessarily involved in the case, and that the case could not have been determined without deciding such question. It must show that the particular federal question relied upon, to-wit, a right under the treaty, was *specially set up or claimed at the proper time and in the proper way*, or that this case is one of the *rare exceptions* to this rule.

It may be that the court might have taken judicial notice of this treaty, and of the particular clause thereof under which plaintiff in error claims, and that thereby a federal question *might have been raised*. But this court has repeatedly held that it will take jurisdiction only when a federal question was *actually raised and decided*, not when it simply *might have been raised*.

Maxwell vs. *Newbold*, 181 How. 511;
Crowel vs. *Randel*, 10 Pet. 368, 398;
Brown vs. *Colorado*, 106 U. S. 639;
Hagar vs. *California*, 154 U. S. 639.

In *Hagar* vs. *California*, this court said:

> "It *nowhere appears from this record that any federal question was actually decided by the court below*. None is specifically made by the pleadings, and we cannot say that any was raised under the general allegations in the answer or demurrer. * * * *It is not enough that a federal question might have been raised*. We have no jurisdiction unless

it *actually was raised and either decided or necessarily involved in the judgment pronounced.*"

In *Chateau* vs. *Gibson*, 11 U. S. 200, this court said:

> "It must appear affirmatively on the face of the record, not only that a federal question was raised and presented to the highest court of the State for decision, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case."

In the case at bar, the treaty was not pleaded, no right was pleaded thereunder, so far as the record shows, it was never called to the attention of the State trial court, and the case was tried and decided without reference thereto. Even if we were to admit that the treaty applied to the case at bar, the case appears from the record to have been decided wholly on the effect accorded to foreign judgments and statutes by comity of nations alone.

Plaintiff in error contends that it did in the trial court, in its pleadings, specially set and claim a right under this treaty, and thus actually raised a federal question. Let us see. It pleaded the Hawaiian decree of divorce, the Hawaiian statute that provided for a forfeiture to the husband of the wife's personal property when such a decree is rendered, and the Hawaiian judgment in an action to which defendant in error was not a party, whereby it was decided that such forfeiture took place.

We cannot tell from the argument of plaintiff in error on the motion to dismiss whether it relies upon its pleading the decree of divorce and Hawaiian statute, or the judgment in the action by the administrator of the

husband's estate against plaintiff in error, or all three, as its special setting up of its right under the treaty.

On page 8 of its brief on this motion it said: "The "effect of this Hawaiian decree (of divorce) and statute "upon the property involved was the *only defense* "attempted." This is an admission that it did not defend because of any right under the treaty, and consequently did not attempt to raise any such question.

On page 9 of said brief it said: "By thus pleading "the final adjudication of the court of a foreign "country, involving the operative effect of a statute of "that country (referring to the judgment in the admin-"istrator's case), the defendant in error necessarily "presented to the trial court a federal question, viz.: a "right claimed under a treaty, etc., etc." This is an assertion that it relied upon the treaty as a defense, and that the pleading of this judgment was a special setting up of a right under the treaty.

On page 12 of said brief, it said: "But the defendant "in the State court did not rest solely upon the judg-"ment (of divorce), but *ex industria* pleaded also the "statute * * * And by pleading this law in a "California court its express recognition by treaty "became at once a necessary question presented for "decision." This is a claim that the pleading of the Hawaiian statute was a special setting up of a right under the treaty.

On page 21 of said brief it said, after referring to the administrator's judgment as deciding that the "goods" here in question were not the property of defendant in error, "By the treaty hereinbefore referred

" to this decision of the Hawaiian court is conclusive, " and the decision of this (California) court, diametric- " ally opposed to the decision of the Hawaiian court, " deprives the defendant company of the right conferred " by this treaty." In this statement it claims that the pleading of the administrator's judgment was a special setting up of this right under the treaty.

On page 22 of said brief it said: "The Mutual Life " was claiming the decree of divorce necessarily in- " volved the application of the statute, and that there- " fore the decree and statute had force in California by " virtue of the treaty." It here relies upon the decree of divorce and statute as together being a special setting up of a right under the treaty.

We submit that plaintiff in error was correct in its first statement only, to-wit, that its only attempted defense was the decree of divorce and the statute. It never knew of the treaty until after the appeal to the State supreme court, and never thought of raising in the trial court any question thereunder.

We submit further, that neither the administrator's judgment, nor the decree of divorce, nor the statute, nor any of these together, was a special setting up of any right under the treaty.

This federal question could not be specially or at all set up by pleading this administrator's judgment, because such a plea could not be material or competent against defendant in error under any law (134 U. S. 649). No court could admit it in evidence against defendant in error. Ignoring, therefore, as we must, this judgment and the payment thereof, was the pleading of

the decree of divorce and the statute a special setting up of a right under the treaty?

Plaintiff in error relies upon the court's judicial knowledge of the treaty as sufficiently supplementing its pleading to satisfy the requirements of the third clause of Section 709, and it cites *Bell* vs. *Bell*, 181 U. S. 175, wherein the judgment of a sister State was pleaded as *res adjudicata* in a State court, and this was held sufficient to raise a federal question, and yet no specification was made in the pleading that such judgment was pleaded under the "full faith and credit" clause of the Constitution.

While it may be that in the case of *Bell* vs. *Bell* no mention *in terms* was made of the "full faith and credit" clause of the federal Constitution, it does appear that the defendant therein pleaded the judgment of a Pennsylvania court, granting a divorce, and hence terminating the marriage which, or rather the dissolution of which, was the only subject-matter or cause of action, and the existence of which was essential to the jurisdiction of the New York court, and the plaintiff replied *denying the jurisdiction of the Pennsylvania court* to grant the decree (of divorce), averring *want of service*, and also non-residence etc. of all the parties in the State of Pennsylvania, all of which was essential to jurisdiction in the Pennsylvania court. It further appeared that service was by publication only and judgment was by default. It was found that when the Pennsylvania action was begun the wife was resident in New York, and that the husband was not a *bona fide* resident in Pennsylvania.

Nothing short of express words could show more plainly that the question of "full faith and credit" to the judgment of a sister State was involved.

The action of this court, however, in a subsequent and similar case, *Jacobs* vs. *Marks*, 182 U. S. 583, would indicate *arguendo* that the mere pleading of a judgment of another State, without specially setting up the right claimed under Article IV of the Constitution was not sufficient. In this latter case this court went through the labor of a long analysis of the record to show that this constitutional right had been especially set up in the trial court, in addition to the plea of a judgment of a sister State, and yet it would seem that this court would have sustained its jurisdiction simply by referring to the plea of such judgment, if that had been sufficient.

Bell vs. *Bell* and the case at bar are not, however, similar. The mere pleading of the judgment of a sister State might well be held to be a special setting up of a right under this particular provision of the Constitution, as the pleading of it not only necessarily would suggest such a provision, but could raise no other question. In the case at bar the plea of the decree of divorce and the statute did not necessarily suggest the treaty, nor were they made competent by the treaty. They were competent under the State law as a defense tending to show that the defendant in error was not entitled to recover.

Presuming that the court might take judicial knowledge of the treaty, yet this defense would no more suffice to suggest the claiming of a right thereunder,

than the court's judicial knowledge of the Constitution or laws of Congress would suffice to raise a federal question in any case other than one like *Bell* vs. *Bell* and similar cases, which cases may be classed as the *rare exceptions* mentioned in *Columbia* vs. *Water Power Co.*

Because this court in *Bell* vs. *Bell* took judicial notice of the Constitution, plaintiff in error claims that it, "by parity of reasoning, pleading the Hawaiian de-" cree and statute, specially set up or claimed a right " under the treaty, and that a federal question was " thereby necessarily injected into the record". This is not a stronger case than *Oxley Stave Co.* vs. *Butler*, *supra*, and yet in that case it was held that the general allegation or claim in the record of the trial court that the judgment of the said court was passed against some persons who were at the time dead, and against others who were necessary parties but who had no notice of the proceedings, did not, within the meaning of Section 709 of the Revised Statutes, specially set up a right or immunity under the Fourteenth Amendment of the Constitution of the United States, forbidding a State to deprive any person of his property without due process of law.

If, however, it is necessary only to plead certain facts to which some provision of the Constitution, some Act of Congress, or some treaty might apply, and the court's judicial knowledge will do the rest, this court should have decided otherwise in *Oxley Stave Co.* vs. *Butler.*

To the same effect as *Bell* vs. *Bell* plaintiff in error cites:

Dupasseur vs. *Rochereau*, 21 Wall. 130;
Gregory vs. *McVeigh*, 23 Wall. 294;
Des Moines vs. *Iowa*, 123 U. S. 552.

In these cases it was held that the pleading in a State court of a prior adjudication of a United States court necessarily raised a federal question. But they fall under the *first*, and not under the *third* clause of Section 709, and therefore are not in point.

III.

No federal question was involved in the decision of the California court, nor is any federal question apparent in the record.

(1)

We have shown that the rule that, if the decision of a federal question is *necessarily* involved in the case, the fact that it was not specially set up and claimed is not conclusive against a review of such question by the supreme court of the United States, does *not* apply to the cases specified in the *third* clause of Section 709, to which class the case at bar belongs.

If, however, this rule does obtain, and it is requisite only that a federal question should be *necessarily* involved in the decision, and that this federal question should be clearly apparent in the record, still we insist that the writ should be dismissed, because, as we have pointed out, it not only *does not appear from the record that the treaty in question was in any way involved in the*

decision, but on the contrary, it appears from the record *that it was not so involved.*

Barring the briefs of counsel, and the petition for rehearing, filed in the supreme court of the State of California, and the petition for this writ of error, which are no parts of the record for this purpose, there is nothing *in this record* to show that either in the trial court or in the supreme court of the State of California the Hawaiian treaty in question was ever considered by either court, or called to its attention, or was involved in the decision. The opinion of the State supreme court did not mention it. This latter court explicitly referred to the Honolulu decree of divorce, and referred to it as one * * * " which could not " have been obtained here and upon a Hawaiian stat- " ute which has no force here except by comity", thus showing by the last words, "*by comity*", that it was not considering a right under the treaty. That court in its judgment accorded full force and effect to the decree of divorce, likwise to the Hawaiian statute, but rested its decision on the fact that the defendant in error was not affected by the statute, by reason of the fact that she was not a resident of nor domiciled in Hawaii at the time the statute could have been operative had she been there, but that on the contrary at that time she was domiciled in California, and hence that the Hawaiian statute " had no operation upon her or her personal " property here; for the law which governs personal " property is the law of the domicile ". " In our " opinion ", said the court, " the respondent at the time " when the Hawaiian statute took effect was domiciled " in California."

This opinion of the California supreme court was not modified by the petition of the plaintiff in error for a rehearing. On the contrary, the court declined to pass upon the federal question attempted to be presented in said petition, and denied a rehearing. The defendant in error, therefore, in her moving papers to dismiss this writ of error ignored said petition.

Mallet vs. *North Carolina*, 181 U. S. 592.

(2)

The treaty does not apply to this case.

Article VIII of the treaty between the United States and the Kingdom of Hawaii, from which article the plaintiff in error has quoted the particular clause upon which it relies, is as follows:

> "The contracting parties engage in regard to the personal privileges that the *citizens of the United States of America* shall enjoy in the dominions of His Majesty the King of the Hawaiian Islands, and the *subjects of his said Majesty* in the United States of America, that they shall have free and undoubted right to travel and to reside in the states of the two high contracting parties, subject to the same precautions of police which are practiced towards the subjects or citizens of the most favored nations. They shall be entitled to dispose of their personal property of every kind and description, etc., etc., and their heirs or representatives, being *subjects or citizens of the other contracting party*, shall succeed to their personal *goods*, whether by testament or *ab intestato*, and may take possession thereof by themselves or others acting for them, and dispose of the same at will, paying to the profit of the respective governments such dues only as the inhabitants of the country wherein the said *goods* are shall be subject to pay in like cases. And in case of the absence of the heir and representative such care

shall be taken of the said *goods* as would be taken of the *goods* of a native of the same country in like case until the lawful owner may take measures for receiving them. *And if a question should arise among several claimants as to which of them said goods belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are.* * * * Where on the decease of any person holding real estate within the territories of one party, such real estate would by the laws of the land descend on a *citizen or subject of the other*, were he not disqualified by alienage, such *citizen or subject*, etc. * * *

"*The citizens or subjects of the contracting parties* shall not be obliged to pay, under any pretence whatever, any taxes or impositions other or greater, etc., * * * and each of the two contracting parties engages that *the citizens or subjects of the other* residing in their respective states shall enjoy their property, etc., etc."

Article IX also provides as follows:

"*The citizens and subjects of each of the two contracting parties* shall be free in the states of the other to manage their own affairs, etc."

This treaty does not apply to the case at bar because,

(*a*) *The treaty was intended to protect only the citizens of the United States and the subjects of the* Hawaiian kingdom in disputes between such citizens on the one side and such subjects on the other side, whereas the record shows or attempts to show that both the defendant in error and her husband (the only claimants to this policy of insurance) *were both citizens of the Republic of Hawaii* (successor to the Kingdom of Hawaii) *at the time of the beginning of the divorce proceedings.*

If in this divorce proceeding a question did arise as to the ownership of this policy, and the decree of

divorce and statute together took effect as of the beginning of the action, when both were such citizens, the treaty does not apply, because it relates only to disputes between a citizen of the United States on the one side and a citizen of Hawaii on the other. The treaty would not be pertinent as to disputes in either country between its own citizens.

(*b*) *This policy of insurance is not covered by the terms of the treaty.*

The treaty provides that the title to any "*goods*" shall be decided by the laws and judges of the country "wherein the said *goods* are".

The object of this treaty was to make it certain that as to corporeal personal property the title should be governed, not by the law of the domicile of the owner, but by the law of the bodily *situs* of the thing itself. Throughout the treaty the word "goods" is used in this limited sense.

Article II provides as follows:

> "No duty of customs or other import shall be charged upon any *goods*, *the product or manufacture of one country*, upon importation from such country into the other, other or higher than the duty or import charged upon *goods* of the same kind, the *product or manufacture of*, or imported from any other country."

Article III provides as follows:

> "All *goods* which can legally be exported or re-exported from either country to the other, in ships of that other country, shall, when so exported or re-exported, be subject to the same duties, etc., etc., etc., whether exported in ships of the other; and all *goods* and articles of whatever description,

not being of the produce or manufacture of the United States, etc., etc., etc."

Article VIII uses the word "goods" in the same sense. This term was clearly not intended to cover intangible property, such as a policy of insurance, as it cannot be said to be *in any land*, but must be in the owner thereof, whereas a horse, a piano, a barrel of sugar, necessarily has a corporeal *situs*, which may be different from the *situs* of its owner.

An insurance policy is simply evidence of a debt, payable upon a contingency (*16 Am. & Eng. Enc. of Law*, 843), an intangible thing, and has no *situs*, except as hereafter stated, distinct and apart from the residence of the holder. It pertains to and follows the person (*People* vs. *Eastman*, 25 Cal. 604). This distinction between the actual *situs* of a corporeal chattel and of intangible property is clearly pointed out by the supreme court of California in *Estate of Fair*, 128 Cal. 612. The question at issue was the taxation of certain railroad bonds that were not physically present in California, but were physically in the State of New York. It was contended that they were not taxable in California, as its constitution provided for taxing only "all property *in the State*". The court held that "intangible per-" sonal property has no *situs* apart from the domicile of " the owner * * * that not the paper writing, but " the obligation to pay is the thing of value, and in the " nature of things this can have no actual locality". This court has said the same thing. In *Kirtland* vs. *Hotchkess*, 100 U. S. 498, it said that a "debt, although

" a species of intangible property, may, for the pur-
" poses of taxation, *if not for all others*, be regarded as
" situated at the domicile of the creditor", and that a bond, "wherever actually held or deposited, is only evi-
" dence of the debt". This holds equally true as to an insurance policy. It therefore is not included in the term "*goods*" as used in the treaty, as the object of this treaty was to provide for the determining of conflicting claims to the title to tangible property by the law of their corporeal *situs*.

Plaintiff in error states, in opposition to the above, that the policy was actually in Hawaii in the possession of Carter, Administrator of the estate of the husband of defendant in error when he began the action in Honolulu against plaintiff in error. The record (trans. fol. 38) shows that the testimony on this subject was not admitted, and, therefore, the policy was not in Honolulu so far as this court can know.

It is also stated by plaintiff in error that the domicile of the insurance company was in Honolulu, and therefore that Honolulu was the *situs* of the policy, and it cites *Mutual Life* vs. *Woodworth*, 111 U. S. 138, as holding to this effect. That case simply held that under the laws of Illinois, for the purpose of administration or bringing suit, that State should be treated as the domicile of any foreign insurance company doing business therein.

(c) *No "question has arisen among several claimants as to which of them said goods belong".*

The defendant in error was not a party to the suit upon the policy in Honolulu, and the administrator of

the estate of Henri McGrew was not a party to the suit upon the policy in California. There was no *question* in Honolulu "*among several claimants*" as to which of them this policy belonged. There has been no *question* in California "*among several claimants*" as to which of them this policy belonged, and the insurance company has never claimed to be the owner of the policy. The contingency that would bring the treaty into operation therefore has never arisen.

To this plaintiff in error replies that this question arose and was determined in the divorce proceedings, wherein the Hawaiian court obtained jurisdiction over defendant in error while she was a resident of Honolulu; that "the effect which these divorce proceedings " had upon her personal property was thereafter directly " brought in issue by the case of *Carter, Administrator* " vs. *Mutual Life Insurance Company of New York*" (brief of plaintiff in error on motion to dismiss, p. 20); that in said case the Hawaiian court construed its own statute and decided "that the 'goods' here in question " were not the property of Mrs. McGrew" (same brief, p. 21).

This statement is absolutely unsupported, as this judgment, *which is not in evidence*, could not and did not decide as against defendant in error that the "goods" were not hers, and this action in Honolulu must be entirely ignored in considering the question, "Did the " title to this policy form a part of the subject matter " of the divorce action so as to amount to a *question* " *among several claimants as to which of them said goods* " *belong?*"

(*d*) *If there had been any determination of the ownership of this policy between several claimants, then, by the California judgment the ownership of this policy has been "finally decided by the laws and judges of the land wherein the said goods are".*

The decision of the State court that the domicile of the defendant in error at the time of the divorce was in California, though a non-federal question, is in line with the views of this court upon this subject. In *Anderson* vs. *Watt*, 138 U. S. 706, and *Cheever* vs. *Wilson*, 19 Wall. 108, 123, 124, this court recognized the doctrine laid down by the Supreme Court of California in this case as to the ability of a wife to obtain a a separate domicile "*in those cases where the express* " *object of all proceedings is to show that the relation* " *itself ought to be dissolved or so modified as to estab-* " *lish separate interests*".

This is such a case. The wife was ejected from her home, she was deprived of all support, and a suit for divorce was instituted. The *fact* of the one domicile of husband and wife was at an end, and the *fiction* of this unity of domicile ceased when the husband discarded his wife by ejecting her from his home and instituting proceedings for the dissolution of the bonds of matrimony.

There is no question as to the jurisdiction of the Honolulu court in the divorce proceedings. The defendant in error appeared in that case, and jurisdiction was thereby acquired, independently of her domicile. At that time, however, such was her domicile. But after the husband had excluded her from his home,

actually turned her adrift on the world, refused her both home and support, she could then change her domicile as she pleased. The husband could not claim the benefit of the fiction of one domicile, and at the same time escape its burdens by driving her from his home.

If the defendant in error was domiciled in California at the time of the decree of divorce, the Hawaiian law forfeiting her title to this policy of insurance could not under the treaty take effect, because it was not the *law of the land wherein the said policy was*. The law of the land wherein the said policy was situate, was the law of California, where the owner of the policy was domiciled.

It is claimed that as this insurance policy was delivered in Honolulu, the contract being made there, it was therefore a Honolulu contract, and must be governed by the laws of Hawaii (*Mutual Life* vs. *Cohen*, 21 Sup. Crt. Rep. 106). This may be conceded as to the construction of the contract of insurance, but it has no application to a question dehors the contract, to-wit: the question of ownership of the contract. On its face it was payable to the defendant in error. The only question was whether the Hawaiian law worked an involuntary assignment thereof, a matter entirely dehors the policy.

Argument for Affirmance.

If the motion to dismiss this writ of error be not granted, we submit that the judgment of the California Court should be affirmed. The only question in the

case is, "WAS THE TITLE OF THE DEFENDANT IN ERROR TO THIS POLICY OF INSURANCE DIVESTED BY THE DECREE OF DIVORCE?" The California Supreme Court answered this question in the negative, and upon this point we submit, without repeating them,

1. *Opinion of the Supreme Court of California* (trans. page 93).

2. *Respondent's Briefs fited in said Supreme Court* (trans. pages 59 to 74, and 89 to 92).

In considering these briefs we call attention to the point contained in folios 127 and 128 of this Transcript, and desire to state that we are aware that this Court has in *Huntington* vs. *Attrill*, 146 U. S. 664, laid down a rule different from that held by the authorities cited in these two folios as to what is a Penal Statute in an international sense. But this fact does not, however, militate against the rest of these briefs nor the opinion of the California Court, as the case was not decided upon those authorities.

Conclusions.

We therefore most respectfully submit

I.

That this writ of error should be dismissed,

1. Because there is no federal question in the case, as plaintiff in error does not claim in or for itself any right under the treaty;

2. Because no right under the treaty was specially set up or claimed as required by law;

3. Because no federal question was involved in this decision nor is any apparent in the record.

II.

That the judgment of the Supreme Court of California should be affirmed,

1. Because the decree of divorce did not divest defendant in error of her property rights in this policy of insurance;

2. Because the statute alone purported to divest the policy, and then only when the divorce was decreed;

3. Because defendant in error was domiciled in California when the divorce was decreed;

4. Because the statute could not work such divesture against a person domiciled in California.

Respectfully submitted,

RICHARD BAYNE,

H. G. PLATT,

Attorneys for defendant in error.

PLATT & BAYNE,
of Counsel.